

IN THE
Supreme Court of the United States
OCTOBER TERM, 1975

SEP 1 1976

MICHAEL RODAK, JR., CLERK

No. 75-1318

CECLE G. PEARSON,

Appellant.

v.

W. P. DODD; ERNESTINE DODD, his wife;
and COLUMBIA GAS TRANSMISSION
CORPORATION.

Appellees.

ON APPEAL FROM A DECISION OF THE
SUPREME COURT OF APPEALS OF WEST VIRGINIA

BRIEF OF AMICUS CURIAE

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STATEMENT OF INTEREST

This appeal challenges the West Virginia tax sale procedures as violating the due process clause of the Fourteenth Amendment. The State of West Virginia has attempted to provide a tax sale procedure that is both consistent with due process and efficient in its collection of tax revenue. To defend the integrity of this procedure and to preserve its sanctity, the State of West Virginia, by its Attorney General, submits this brief *amicus curiae*.

SUMMARY OF ARGUMENT

The State of West Virginia respectfully submits that the appellant herein was not denied due process of law because she failed to exercise the "due vigilance" which this Court said was required of a taxpayer in *Longyear v. Toolan*, 209 U.S. 414 (1908). In the instant case, if the appellant had made any attempt to pay her taxes for a period of almost four and one-half years, she would have learned of the tax status of the property and could have effected redemption thereof prior to confirmation of the sale by the Deputy Commissioner of Forfeited and Delinquent Lands. Due process of law, the State submits, was afforded the appellant for four and one-half years at every step in the proceedings which culminated in the West Virginia Court's confirmation of the sale to Dodd. The State further submits that the appellant was not denied due process of law because, at the time of notice of publication of the deputy commissioner's suit in which the subject property was included, she had been totally divested of all right, title and interest therein and absolute title thereto was vested in the State of West Virginia.

It is further submitted that West Virginia Code 11A-3-8 does not operate as a statute of limitations to prevent a former owner from attacking the validity of a tax sale. To the contrary, it is a limitation on a statutory entitlement to redeem delinquent property, previously sold to the State, within eighteen months from the date of such sale. It is also further submitted by the State of West Virginia that its statutory procedure for disposing of delinquent real estate is in complete accord with concepts of procedural due process adhered to by this Court in its decisions over

the past eighty years. Therefore, the State of West Virginia respectfully asks, if this Court decides to overrule its prior decisions and decides that West Virginia Code 11A-4-12 denies due process of law to a former owner whose property has been sold as a result of nonpayment of taxes, that such decision will have no retroactive application.

ARGUMENT

I.

INTRODUCTION: STATUTORY PROCEDURE FOR TAX SALES.

The State's interest in having and maintaining an orderly system of enforcement of its tax claims was well stated by the West Virginia Legislature in its "Declaration of legislative purpose and policy," contained in West Virginia Code 11A-3-1, wherein it stated that:

"In view of the paramount necessity of providing regular tax income for the State, county and municipal governments, particularly for school purposes; and in view of the fact that tax delinquency, aside from being a burden on the taxpayers of the State, seriously impairs the rendering of these essential services; and in view of the further fact that delinquent land, with its attendant problems made acute by the events of the past decade, not only constitutes a public liability, but also represents a failure on the part of delinquent private owners to bear a fair share of the costs of government; now, therefore, the legislature declares that its purpose in the enactment of this and the following article [§11A-4-1 et seq.] is threefold: First, to provide

for the speedy and expeditious enforcement of the tax claims of the State and its subdivisions; second, to provide for the transfer of delinquent lands to those more responsive to, or better able to bear, the duties of citizenship than were the former owners; and third, in furtherance of the policy favoring the security of land titles, to establish an efficient procedure that will quickly and finally dispose of all claims of the delinquent former owner and secure to the new owner the full benefit of his purchase."

The method of collection and the enforcement of property taxes in the State of West Virginia are substantially as follows:

First, Article XIII, Section 6, of the Constitution of West Virginia provides, in pertinent part, that:

"It shall be the duty of every owner of land, or of an undivided interest therein, to have such land, or such undivided interest therein, entered on the land books of the county in which it, or a part of it, is situated, and to cause himself to be charged with taxes legally levied thereon and pay the same. * * *"

This constitutional requirement is further embraced in West Virginia Code 11A-4-2, which provides as follows:

"It is the duty of the owner of land to have his land entered for taxation on the landbooks of the appropriate county, have himself charged with the taxes due thereon, and pay the same. Land which for any five successive years shall not have been so entered and charged shall by operation of law, without any proceedings therefor, be forfeited to the State as provided in section 6, article XIII of the Constitution, and shall thereafter be subject to transfer or sale under the provisions of sections 3 and 4 of such article."

Article XIII, Section 4, of the Constitution of West Virginia provides that:

"All lands in this State, waste and unappropriated, or heretofore or hereafter for any cause forfeited, or treated as forfeited, or escheated to the state of Virginia, or this State, or purchased by either and become irredeemable, not redeemed, released, transferred or otherwise disposed of, the title whereto shall remain in this State till such sale as is hereinafter mentioned be made, shall by proceedings in the circuit court of the county in which the lands, or a part thereof, are situated, be sold to the highest bidder."

Therefore, the law is clear that it is the duty of the landowner to have his land entered on the land books for taxation, to have himself charged with taxes, and to pay the same. In the event the landowner fails to pay his taxes for any year, such property becomes delinquent and, therefore, subject to sale under the following procedure. After April 1 of each year, the sheriff publishes a notice to the effect that taxes assessed for the previous year have become delinquent, and that, unless paid by April 30, will be included for publication in the delinquent lists. W. Va. Code 11A-2-10a. The sheriff is then required to prepare the delinquent lists on or before May 1 following the year for which the taxes were assessed, which list is arranged by districts and alphabetically by name of the person charged. W. Va. Code 11A-2-11. A copy of each of the delinquent lists is required to be posted at the front door of the courthouse of the county for at least two weeks and, in addition thereto, a copy of each list is required to be published one time in two qualified newspapers of opposite politics published in the publication area. Any landowner whose taxes were

delinquent on May 1 may have his name removed from the delinquent lists prior to publication by paying the full amount of taxes then due. W. Va. Code 11A-2-13.

On or before September 10 of each year, the sheriff is required to prepare a second list of delinquent lands which includes all lands in his county still delinquent as of September 1, together with a notice of sale to the effect that the tracts of land described therein will be offered for sale at public auction at a given date and time at the front door of the courthouse. The notice further provides that any tract of land, or undivided interest therein, may be redeemed at any time prior to sale by payment of the amount of taxes, interest, and charges due at the date of redemption. This second delinquent list and notice of sale are required to be published once a week for three successive weeks in two qualified newspapers of opposite politics published in the publication area. W. Va. Code 11A-3-2. The owner of any delinquent real estate or any other person entitled to pay the taxes thereon may redeem at any time prior to sale by payment of the taxes, interest and charges then due. W. Va. Code 11A-2-18.

The sheriff is then required to offer for sale each unredeemed tract of land at public auction to the highest bidder on any Monday after October 14 and before November 23. W. Va. Code 11A-3-4. If no person present bids the amount of taxes, interest, and charges due on any property offered for sale, the sheriff is required to purchase it on behalf of the State for the amount of taxes due. W. Va. Code 11A-3-6. In the event of purchase by the sheriff on behalf of the State, title to such real estate is vested in the State, subject to the right of redemption by the former owner. W. Va. Code 11A-3-7. The former owner of any property

purchased by the State, or any other person who was entitled to pay the taxes thereon, has the right to redeem such property from the State Auditor at any time within eighteen months from the date of purchase. At the end of the eighteen-month period, the property becomes irredeemable and subject to transfer or sale under the provisions of Sections 3 and 4, Article XIII, of the Constitution. W. Va. Code 11A-3-8. The State Auditor is ex-officio State Commissioner of Forfeited and Delinquent Lands and in that capacity is charged with the duty of administering and carrying into execution the laws with respect thereto. W. Va. Code 11A-4-4. The Auditor appoints a deputy commissioner of forfeited and delinquent lands for each county, who is licensed to practice law and who acts as the Auditor's local agent within the county. W. Va. Code 11A-4-5.

Between May 1 and October 1 of each year, the Auditor is required to certify to the circuit court of each county a list of all lands in the county which have become subject to sale. The certification process, for instance, embraces delinquent properties or any interests therein which have become irredeemable as a matter of right and on which no taxes have been paid for the preceding three tax years. For example, the property in issue in this case was sold to the State as a result of nonpayment of taxes for the year 1961 and was certified to the circuit court as subject to sale on August 31, 1964. The list of items certified to the circuit court is made in quadruplicate by the Auditor, who keeps the original. One copy is sent to the clerk of the circuit court, one to the clerk of the county court, and one to the deputy commissioner of forfeited and delinquent lands. W. Va. Code 11A-4-9. After receipt of

the certified list, the deputy commissioner is required to institute a suit or suits in the name of the State of West Virginia for the sale for benefit of the school fund of the lands included in the certified list received from the Auditor. The deputy commissioner is required to institute the suit "as soon as possible" after receipt of the certified list. W. Va. Code 11A-4-10.

In a suit for the sale of forfeited or delinquent land, the deputy commissioner is required to name as a party defendant the former owner in whose name the land was either forfeited or returned delinquent. The deputy commissioner is also required to make all unknown claimants and all other persons who, according to his knowledge, have any interest in any land included in the suit parties defendant. Any person claiming any interest in land included in the suit may intervene at any step in the proceeding by filing a petition in the suit setting forth what interest he or she claims, and such person thereby becomes a party defendant. W. Va. Code 11A-4-11. Once the suit is instituted, the clerk of the circuit court is required to enter an order of publication giving the style of the suit as *State of West Virginia v. A. B. et al.*, which order states that the object of the suit is to obtain a decree of the circuit court ordering that all lands included in the suit be sold for the benefit of the school fund. The order of publication lists such lands by their local description as to each item, the former owner in whose name the land was forfeited or returned delinquent and the names of any other defendants which may be interested therein. The order of publication further requires that all named defendants and unknown parties interested in any of the lands included in the suit appear within one month after the date of the first

publication and protect their interests. Such order of publication is required to be published once a week for three successive weeks in two qualified newspapers of opposite politics published in the county.

The provision for service of process by publication is contained in West Virginia Code 11A-4-12, the last paragraph of which statute reads as follows:

"In view of the fact that the State has absolute title to all forfeited land, to all land sold to the State for nonpayment of taxes and become irredeemable, to all escheated land, and to all waste and unappropriated land, and must under the Constitution have such an absolute title before the land may be sold for the benefit of the school fund; and in view of the fact that the former owner of any such land, or any person claiming under him, has no further interest therein nor rights in respect thereto except such privilege of redemption as may be extended to him by the legislature as an act of grace; and in view of the further fact that all parties known and unknown who may claim an interest in any of the lands included in the suit are given notice thereof by the order of publication provided for above; therefore, the legislature deems it both expedient and necessary to provide that failure to name any such person as a defendant shall in nowise affect the validity of any of the proceedings in the suit for the sale of the State's title to such land; and in view of the fact that the supreme court of appeals in a decision just rendered has held that there is no constitutional requirement that the former owner or any other interested person be personally served with process in a suit for the sale for the benefit of the school fund of lands that are and must be the absolute property of the State; and in view of the further fact that in its last previous enactment of this section the legislature had no

intention of requiring that personal service of process on named defendants in such a suit should be a mandatory condition precedent to the validity of any step or proceeding in such suit, but on the contrary expressly stated that failure to serve the summons on any named defendant should in nowise affect the validity thereof; now therefore, the legislature also deems it both expedient and necessary to provide that the failure to obtain such personal service on any named defendant in any suit instituted under the provisions of this article prior to the effective date hereof [March 11, 1949] shall in no way affect the validity of any step or proceeding in any such suit or the validity of the title acquired by the purchaser of land sold under any decree made or to be made in any such suit."

The suit, as instituted, must contain an averment that all land included therein is subject to sale for the benefit of the school fund in accordance with the Auditor's certification to the circuit court. The suit must also contain a list of the lands included therein which indicates the total amount due as to each item certified and further indicating whether the land is delinquent, forfeited, etc., its location and description, the name of the former owner, and the year of forfeiture or sale to the State. It is further requires that the suit shall state that there may be parties unknown who claim an interest in the lands included therein and, therefore, shall contain a prayer that all the right, title and interest of such unknown claimants who fail to appear and defend be forever foreclosed. If the deputy commissioner learns of any land included in the suit which is not subject to sale, he shall state that fact in his bill and the reasons for his conclusion. In such case, the deputy commissioner shall ask that the court enter

an order dismissing the suit in respect to such land. With respect to all other land included in the suit, the prayer shall be that the court enter a decree ordering the sale thereof for the benefit of the school fund as required by the Constitution of West Virginia. W. Va. Code 11A-4-13. The former owner of any forfeited or delinquent land, or any other person entitled to pay the taxes thereon, may file a petition in such suit with the circuit court or the judge thereof in vacation at any time before the sale is confirmed requesting permission to redeem the land to the extent that title thereto remains in the State. The circuit court may, by decree, permit the petitioner to redeem the land upon payment to the sheriff of the total amount of taxes, interest and charges due thereon on the date of redemption, together with any court costs properly chargeable thereto, which total amount is fixed by the court. When such payment is made, the court enters^{*} a decree declaring the redemption of such land by the petitioner so far as title thereto remains in the State and dismisses the suit in respect thereto. If the redemption is effected after sale, the decree also directs the sheriff to return the purchase money to the purchaser. W. Va. Code 11A-4-18. When the court finds that the land is subject to sale for the benefit of the school fund, it enters a decree ordering the land to be sold at public auction by the deputy commissioner at a time and place fixed by the court. W. Va. Code 11A-4-22. For the purpose of encouraging attendance and bidding at the sale, the deputy commissioner is required to publish a notice of sale once a week for three successive weeks in two newspapers of opposite politics in the county. The notice contains a list of all lands to be sold, and each item is set forth by quantity, local description and the

name of the former owner with respect to delinquent land. W. Va. Code 11A-4-23. On the day fixed for sale pursuant to the court's order, the deputy commissioner is required to sell each unredeemed item included in the published list of lands to be sold. The deputy commissioner is required to prepare a report for the circuit court within thirty days after sale showing the disposition of each item ordered to be sold, *i.e.*, whether sold, redeemed before sale, name of purchaser and amount of his bid. W. Va. Code 11A-4-24. The former owner, his heirs or assigns are entitled to any surplus received from the sale in excess of taxes, interest and charges due thereon if they file their claim in the circuit court within two years after the date the sale is confirmed. W. Va. Code 11A-4-28.

"As soon as possible" after the deputy commissioner has filed his report of sale with the clerk of the circuit court, he applies to the court for an order confirming the sale as to each item sold. If the court finds the purchase price to be satisfactory, it enters an order confirming the sale and directing the deputy commissioner to execute and deliver a deed to the purchaser. W. Va. Code 11A-4-31. Upon entry of the order confirming the sale, the former owner's opportunity to redeem is barred for the first time.

The property which is the subject of this suit traveled the foregoing procedural path. Taxes on the property became payable on September 15, 1961. It was sold to the State in 1962 by the Sheriff of Kanawha County as a result of nonpayment of taxes for the year 1961 after being duly published in the Sheriff's delinquent lists as required by West Virginia Code 11A-2-13 and 11A-3-2. It was again included in the Sheriff's delinquent lists which were published in

1963 pursuant to the above-cited Code provisions but was properly suspended from sale by the Sheriff in accordance with West Virginia Code 11A-3-5 because of the prior sale to the State. The property appeared on the land books of Kanawha County for the year 1963 with the notation "Sold to the State 1961" with no taxes extended thereon. The property was redeemable as a matter of right in the State Auditor's office from December of 1962 until April 30, 1964, at which time it became irredeemable and, therefore, subject to sale under the provisions of Sections 3 and 4, Article XIII, of the Constitution. On August 31, 1964, the State Auditor, as ex-officio State Commissioner of Forfeited and Delinquent Lands, certified the subject property to the Circuit Court of Kanawha County to be sold for the benefit of the school fund under Certification No. 9504 for taxes, interest and charges due thereon for the years 1961 through 1963. The property appeared on the Kanawha County land books for the years 1964 through 1966 with no taxes extended thereon with the notation "Sold to State 1961." The deputy commissioner included the subject property in a delinquent land suit instituted in the Circuit Court of Kanawha County on January 31, 1966, and it was duly entered in an order of publication and published in accordance with the provisions of West Virginia Code 11A-4-12. At the deputy commissioner's sale held on April 26, 1966, the property was sold to W. P. Dodd. The sale to Dodd was confirmed by order of the Circuit Court of Kanawha County entered on May 27, 1966. Therefore, the appellant had from September 15, 1961 to May 27, 1966 to pay the taxes on this property and thereby prevent the ultimate sale to Dodd. West Virginia Code 11A-1-7 forbids payment of current taxes until

delinquent taxes have been paid. Therefore, if in 1962, 1963, 1964, 1965, and at any time prior to May 27, 1966, the appellant had made any attempt to pay her taxes on the subject property, she would have learned its status and could have effected redemption thereof. Therefore, the State respectfully submits that its entire statutory system of disposing of forfeited and delinquent lands should not be overturned because of the lack of responsibility and vigilance on the part of the appellant to see that her taxes due and owing the State of West Virginia were, in fact, paid.

II.

WEST VIRGINIA CODE 11A-4-12 DOES NOT VIOLATE DUE PROCESS OF LAW SINCE AT THE TIME NOTICE BY PUBLICATION IS GIVEN ABSOLUTE TITLE TO THE PROPERTY IS VESTED IN THE STATE OF WEST VIRGINIA.

The appellant asserts that West Virginia Code 11A-4-12 violates the due process clause of the Fourteenth Amendment in that it provides for service of process upon former owners of delinquent lands by publication only and makes no provision for personal service. The Fourteenth Amendment of the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." In defining the scope of the Fourteenth Amendment, this Court has stated:

"* * * The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership.

Rather, it has been read broadly to extend protection to 'any significant property interest,' [Citation omitted] including statutory entitlements. * * *"*Fuentes v. Shevin*, 407 U.S. 67, 86 (1972).

In rejecting the appellant's contention, the West Virginia Supreme Court of Appeals found that, at the time notice was published under West Virginia Code 11A-4-12, the appellant, as a former owner, held no significant property interest or statutory entitlements in the property and, therefore, was not entitled to Fourteenth Amendment protection. *Pearson v. Dodd*, 221 S.E.2d 171, 183 (W. Va. 1975). Therefore, the State of West Virginia contends that the appellant, having not been entitled to due process at the time, could not possibly have been denied due process because of service by publication under West Virginia Code 11A-4-12.

The purpose of the published notice provided for in West Virginia Code 11A-4-12 is to give notice of the suit instituted by the deputy commissioner of forfeited and delinquent lands seeking circuit court permission to sell certain delinquent property for the benefit of the school fund. See p. 8, *supra*. A court proceeding of this nature is required by West Virginia Constitution, Article XIII, Section 4. However, Section 4 also requires that before this court proceeding can be instituted, the State must have absolute title to the property. *State v. Farmers Coal Co.*, 130 W. Va. 1, 10, 43 S.E.2d 625, 631 (1947). In order that the State may acquire absolute title, the Legislature has provided that the owner of the delinquent land will be given eighteen months to redeem the property, starting from the date the property is purchased by the State at the sheriff's

sale. See p. 6, *supra*. When the eighteen-month period expires, absolute title to the property becomes vested in the State (West Virginia Code 11A-3-8), and all claims, interests and rights of the owner are terminated. *Pearson v. Dodd*, 221 S.E.2d 171, 183 (W. Va. 1975). Therefore, at the time the deputy commissioner's suit is instituted, the redemption period has expired, completing the process necessary to vest the State with absolute title. Consequently, since the interests of the owner have been divested, no claims remain to be settled in the deputy commissioner's suit. *Pearson, supra*, at 183. The "suit" itself does not dispose of claims but rather is a procedure required by the West Virginia Constitution to sell property to which the State holds absolute title.

One must wonder why the State provides for any notice of the deputy commissioner's suit, when the State views itself as absolute titleholder prior to the institution of the suit. The answer is not simple. The Legislature once provided that the deputy commissioner's suit would be handled as an administrative function of the court because all issues were settled when the suit was brought, leaving only the sale to be administered. This provision was declared unconstitutional under a strict interpretation of the West Virginia Constitution's mandate of separation of powers. *Sims v. Fisher*, 125 W. Va. 512, 25 S.E.2d 216 (1943). To meet the requirement that the proceeding be "judicial," the Legislature had no choice but to provide for a suit against someone (logically, the former owner) and to provide the technical features of a suit, such as service of process. See Colson, *Service Of Process In A Delinquent Lands Proceeding—A Suit That Is Not A Suit*, 54 W. Va. L. Rev. 55, 62 (1951).

In this appeal, the appellant's property, having become delinquent, was sold to the State at the Sheriff's sale because no one present at the sale had bid the amount of taxes, interest and fees due and owing. Upon purchase by the State, the eighteen-month redemption period started to run. When that period expired without the appellant redeeming the property, absolute title to the property vested in the State, cutting off the appellant's interests. Since the property was owned by the State, the deputy commissioner sought to dispose of it by instituting a suit in the circuit court as required by West Virginia Constitution, Article XIII, Section 4.

In light of the foregoing facts, the conclusion is clear. The appellant's property interests and rights were terminated prior to the institution of suit by the deputy commissioner and the publication of notice thereof. Without any significant interest in the property, the appellant could not possibly have been denied due process because of notice by publication.

The State of West Virginia fully acknowledges the requirements of due process and has designed its delinquent land sale procedure accordingly. The State has provided for appropriate due process safeguards for the assessment and collection of taxes and for hearings that provide the taxpayer a forum in which to present his views. In this appeal, however, the appellant does not attack the procedure through which the former owner's rights in the property are terminated and then vested in the State. Rather, the appellant has chosen to attack the State's activities at a point where the divesting procedure has been completed, where the State already *has* absolute title and is simply seeking to dispose of property it already owns. No legal theory

can support the proposition that one who absolutely owns a piece of property must give the former owner of that property notice that he intends to sell it. The published notice provided for in West Virginia Code 11A-4-12 is given by the grace of the legislature, *Pearson, supra*, at 183, and to fulfill the requirement of West Virginia Constitution, Article XIII, Section 4. See pp. 5,8, *supra*. Clearly, the appellant is not entitled to notice of the deputy commissioner's suit; therefore, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

III.

WEST VIRGINIA CODE 11A-3-8 DOES NOT BAR A FORMER OWNER FROM ATTACKING A TAX SALE BUT RATHER BARS THE OWNER'S RIGHT TO REDEEM THE PROPERTY EIGHTEEN MONTHS AFTER THE PURCHASE OF THE PROPERTY BY THE STATE.

The appellant asserts that West Virginia Code 11A-3-8 denies due process of law to an owner whose property interest has been sold at a tax sale because that statute can be invoked to bar the owner from attacking the sale on due process grounds. Such an assertion is unsubstantiated by either the statute or court decisions. The State of West Virginia contends that the appellant has either misconstrued West Virginia Code 11A-3-8 or has misinterpreted the decision of the West Virginia Supreme Court of Appeals in this case.

West Virginia Code 11A-3-8 contains no language whatsoever that would permit its use as a "statute of

limitations" to bar a constitutional attack on a tax sale. That statute provides, in pertinent part:

"The former owner of any real estate so purchased by the State, or any other person who was entitled to pay the taxes thereon, may redeem such real estate from the auditor at any time within eighteen months after the date of such purchase. Thereafter such real estate shall be *irredeemable* and subject to transfer or sale under the provisions of sections 3 and 4, article XIII of the Constitution." (Emphasis supplied.)

West Virginia Code 11A-3-8 clearly and unambiguously states that the property owner's right to *redeem* the delinquent property expires eighteen months after the State purchases the land at the sheriff's sale. The meaning of the word "redeem" can be gathered from additional provisions of West Virginia Code 11A-3-8:

"In order to redeem the person seeking redemption must pay to the auditor such of the following amounts as may be due: (1) The taxes, interest and charges for which the real estate was sold, with interest at the rate of twelve percent per annum from the date of sale. (2) All taxes assessed thereon for the year in which the sale occurred, with interest at the rate of twelve percent per annum from the date on which they became delinquent, except when such taxes are currently due and payable to the sheriff. (3) All taxes except those for the current year which would have been assessed thereon since the sale had the sale not occurred, or which, in the case of land forfeited for nonentry, would have been assessed thereon had the land been properly entered, with interest at the rate of twelve percent per annum from the date on which they would have become delin-

quent. (4) The fee provided by the following section [§11A-3-9] for the issuance by the auditor of the certificate of redemption."

From the statute's use of the word "redeem" and the procedure for redemption, the word "redeem" obviously means the payment of the taxes, interest and fees due and owing on the property; such payment will "redeem" the land. The expiration of the eighteen-month redemption period forecloses the property owner's right to clear the title of the property by paying the outstanding tax indebtedness. West Virginia Code 11A-3-8 does *not* provide that the expiration of the eighteen-month redemption period will foreclose the right of the owner to attack the tax sale proceeding itself.

The appellant has cited no West Virginia decisions that utilize the expiration of the redemption period as a bar to attacks on the validity of the tax sale procedure or the tax deed. The State submits that no such decisions exist. In this case, the West Virginia Supreme Court of Appeals stated that the expiration of the redemption period terminated the appellant's right to redeem her property and vested absolute title in the State. *Pearson, supra*, at 182, 183. The Court did not state that because the redemption period has expired the appellant could no longer assert she was denied due process, but rather that her right to the due process safeguard of notice had terminated upon the expiration of the redemption period. *Pearson, supra*, at 183.

The appellant was permitted to assert a due process attack on the tax sale procedure in question. That attack was considered by the Kanawha County Circuit Court and the West Virginia Supreme Court of Appeals

and decided according to the law and the facts. At no time was the appellant's attack dismissed, but rather was given full and mature consideration. Therefore, the appellant's contention that West Virginia Code 11A-3-8 was utilized to bar a due process attack on the tax sale is groundless.

IV.

NOTICE OF TAX SALE PROCEEDINGS IS SUFFICIENT IF SERVED BY PUBLICATION WHERE THE STATUTES SET FORTH THE STAGES AND TIME ALLOCATED FOR EACH STAGE, PROVIDE A FORUM FOR THE HEARING OF GRIEVANCES AND WHERE THE TAXPAYER HAS A POSITIVE DUTY TO KEEP ABREAST OF THE TAX STATUS OF HIS PROPERTY.

The appellant contends that the West Virginia tax sale procedure denies due process of law because it makes no provision for personal service of notice upon the landowners, but instead relies solely upon notice by publication. This position is contrary to decisions of this Court dealing with the issue.

In *Winona & St. Peter Land Co. v. Minnesota*, 159 U.S. 526 (1895), the Minnesota tax collection statutes provided that a suit listing the delinquent lands be instituted in the district court in order to enforce payment of the outstanding taxes and penalties. Notice of the suit was made by publication for at least two weeks in some paper of general circulation in the county. 159 U.S. at 535. In upholding the validity of published notices, the Court stated:

"All the privileges which are secured to the property owner in respect to the taxes of the

current year are also secured to him in reference to those imposed under amended section 113. He is therefore notified and given an opportunity to be heard before his property is taken from him. Questions of this kind have been repeatedly before this court, and the rule in respect thereto often declared. That rule is that a law authorizing the imposition of a tax or assessment upon property according to its value does not infringe that provision of the 14th Amendment to the Constitution which declares that no state shall deprive any person of property without due process of law, if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection. [Citations omitted.] That the notice is not personal but by publication is not sufficient to vitiate it. Where, as here, the statute prescribes the court in which and the time at which the various steps in the collection proceedings shall be taken, a notice by publication to all parties interested to appear and defend is suitable and one that sufficiently answers the demand of due process of law. * * *” 159 U.S. at 537, 538.

The West Virginia tax sale procedure outlined in the initial section of this brief fully complies with the directives contained in the *Winona* decision. See pp. 3-14, *supra*. The West Virginia law provides that the taxpayer may protest the classification of his property to the assessor and the State Tax Commissioner at any time up to and including the time the county court sits as a Board of Equalization and Review, which would be up to February 28 of each year. W. Va. Code 11-3-24a. The county court sits as a Board of Equalization and Review to which a taxpayer may ask for corrections in the amount of the assessment. W. Va. Code 11-3-24. The taxpayer can appeal these various determinations as

a matter of right to the circuit court within thirty days of the adjournment of the Board of Equalization and Review. W. Va. Code 11-3-25. Depending upon the stage of the proceedings, the West Virginia statutes provide for publication of notice for one week in some stages to three weeks in others. W. Va. Code 11A-2-13 and 11A-3-2.

In *Leigh v. Green*, 193 U.S. 79 (1904), the Court reaffirmed its position. Upholding notice by publication in a tax sale, the Court stated:

“The principles applicable which may be deduced from the authorities we think lead to this result: Where the state seeks directly or by authorization to others to sell land for taxes upon proceedings to enforce a lien for the payment thereof, it may proceed directly against the land within the jurisdiction of the court, and a notice which permits all interested, who are ‘so minded,’ to ascertain that it is to be subjected to sale to answer for taxes, and to appear and be heard, whether to be found within the jurisdiction or not, is due process of law within the 14th Amendment to the Constitution.” 193 U.S. at 92, 93.

Importantly, the Court noted that notice by publication was sufficient enough to permit those who are “so minded” to ascertain that their property is subject to sale for taxes. At least by implication, the Court acknowledged that a property owner must assert some effort to discover the tax status of his property.

The property owner’s duty implied by *Leigh* was fully amplified by *Longyear v. Toolan*, 209 U.S. 414 (1908), a case involving a tax sale procedure practically identical to the West Virginia procedure. In *Longyear*, the Michigan statutes provided a board of review to convene after the assessments were made to correct and

approve the assessments and to hear the complaints of the taxpayer. Thereafter, at a time set by statute, the taxes would become delinquent and the property subject to sale with a redemption period after the sale. Notice of the sale was made by publication. The appellant contended that the substitution of notice by publication for personal service violated due process of law. In response, the Court stated:

"* * * It has been shown that the Michigan law provides a board of review, which holds sessions on days fixed by the law, where every person whose property is on the provisional assessment roll submitted by the supervisor may be heard to correct the assessment. It would seem that this opportunity for hearing, coupled with the provision for setting aside the sale within one year after notice of it, which has been stated, satisfies the requirement of due process of law made by the 14th Amendment, and that the state may be left to enforce the collection of the taxes as it chooses. But we pass this question without deciding it, simply observing that, in *Winona & St. P. Land Co. v. Minnesota*, * * * it was said, * * * that the 14th Amendment was not violated 'if the owner has an opportunity to question the validity or the amount of it either before that amount is determined or in subsequent proceedings for its collection.' If it be assumed that the delinquent taxpayer, who has already had an opportunity to be heard upon the assessment of the tax upon his property, is entitled to further notice of the pendency of proceedings to sell the land in satisfaction of the tax lien, then the statute before us requires a sufficient notice. It is no objection that the notice was only by publication. * * * 209 U.S. at 417, 418.

The Court stated further:

"* * * If he [the taxpayer] exercises due vigilance, he cannot fail to learn of their pendency, and that full opportunity to defend is afforded to him. This satisfies the demands of due process of law* * *." 209 U.S. at 418.

The Court clearly required the property owner to use "due vigilance" to investigate and ascertain the tax status of his property. As noted earlier, the West Virginia law provides several forums in which a taxpayer can appear to contest the assessment and classification of the property. See p. 22, *supra*. The designation of time periods by the West Virginia statutes is similar to those used in *Longyear* and found to be sufficient, *i.e.*, "on or before the 3d Monday in May," "as soon as practicable after the 1st day of June," etc. A West Virginia property owner exercising due vigilance in investigating the tax status of his property cannot help but learn of that status.

The appellant cites several cases in support of her position that notice by publication alone is insufficient to meet due process. While respectful of the wisdom of these decisions, they all lack the single most vital element present in this appeal: None of these cases deal with a regularly occurring, yearly tax on real estate. The cases cited by the appellant deal with the settlement of rights between private parties, with service of process upon incompetents or incarcerated persons, or with tax cases in which the tax is irregular and more esoteric. On the other hand, the property tax involved in this appeal occurs regularly each year and is part of the common experience of every landowner. Moreover, a tax collection system by its very nature requires that the individual property owner exercise a greater degree

of effort and vigilance to keep updated on the tax status of his property. No such duty exists in any of the cases cited by the appellant.

For example, *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), dealt with the judicial settlement of accounts of a common trust fund. Such a suit is between private parties seeking to settle private rights and is not a common occurrence for the average citizen. The statute involved provided that the settlements would occur triennially, while the West Virginia statutes provide with greater specificity when various stages in the tax sale proceedings will occur. Most importantly, there is no positive duty upon the beneficiary of a trust fund to keep abreast of the status of that fund; however such a duty exists for a taxpayer. Likewise, cases dealing with bankruptcies, condemnation proceedings and special water districts are distinguishable because they occur irregularly and thus cannot be anticipated by a common citizen.

The record in this appeal indicates that the appellant's lack of due vigilance in keeping updated on the tax status of her property and in paying the taxes due was so excessive as to border upon a blatant disregard of the law. The appellant's husband, who took care of the appellant's property taxes, was aware that property taxes were assessed annually and that failure to pay the taxes would result in a tax sale of the property. (A. 45.) Therefore, the State asserts that the notice by publication of the tax sale was sufficient and the appellant's alleged failure to learn of the sale was due to her own lack of responsibility.

V.

IF THE COURT DECIDES THAT WEST VIRGINIA CODE 11A-4-12 VIOLATES DUE PROCESS, THAT DECISION SHOULD STATE THAT IT IS NOT RETROACTIVELY APPLICABLE IN ORDER TO PREVENT CONFUSION CONCERNING THE VALIDITY OF TAX DEEDS WHICH HAVE NOW BECOME FINAL.

In the event this Court declares the West Virginia delinquent land sales procedure violative of due process, the State respectfully requests that the decision contain a statement limiting its retroactive application solely to the present case. That the Court has the power to deny retroactive application is clear. *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374 (1940).

A. The retroactive application of the Court's decision should be considered at this time because of the nature of the consequences which the decision will generate.

Though the issue of retroactive application is not specifically before the Court, consideration of the issue at this time is not premature because of the immediate, substantial and widespread consequences which the decision will generate. There are twenty-one jurisdictions, including West Virginia, that rely primarily on notice by publication to effect a tax sale.

In those jurisdictions, as in West Virginia, many land titles are derived from a tax deed. A decision by this Court invalidating the procedure by which these tax

deeds were obtained places in doubt the validity of the present land titles based on the tax deeds. As a result, the doubtful land titles will become unmarketable, investors will be reluctant to improve the land and the income generated from the land will not be readily disposable; such a state of confusion will exist until lengthy court proceedings finally determine who shall prevail. West Virginia records maintained in the State Auditor's office disclose a yearly average of 1607 tracts of land certified to circuit courts for sale for the benefit of the school fund for the past ten years alone.

Clearly, in light of these considerations, the Court must give guidance to those who administer the rules which the Court sets forth. A definitive statement on retroactivity is necessary at this time so that the decision can be readily and justly applied; the consequences of doing otherwise are simply too great to ignore. Therefore, if the need arises, the State of West Virginia urges the Court to define the extent to which a decision requiring more than notice by publication will be retroactive.

B. The decision should not be retroactive because of the maze of relationships, rights and obligations that have evolved in reliance upon the validity of early concepts of procedural due process.

The Court has recognized that a decision disturbing land titles granted under a system challenged as unconstitutional carries unusual gravity. *King v. Mullins*, 171 U.S. 404, 422 (1898). In *Chicot Co. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940), the Court

further recognized that the actual existence of a statute is an operative fact and that, regardless of whether the statute is later declared unconstitutional, its existence "may have consequences which cannot justly be ignored." The Court at 374 stated:

"* * * The past cannot always be erased by a new judicial declaration. The effect of the subsequent ruling as to invalidity may have to be considered in various aspects, — with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination."

A decision declaring notice solely by publication to be inadequate will have consequences that cannot justly be ignored. The tax sale procedures in issue were designed in compliance with concepts of procedural due process previously enunciated by this Court. Regardless of whether these concepts are now deemed obsolete, the fact remains that binding relationships, rights and obligations have arisen on tax deeds granted under those tax sale procedures — procedures relied upon, and deemed final and fair when written. By granting retroactive effect to its decision, this Court can upset the transactions of several past decades, creating legal tangles which would be practically insurmountable. Therefore, the State of West Virginia urges the Court to deny any retroactive application of its decision, except for this dispute now under consideration.

CONCLUSION

The Supreme Court of Appeals of West Virginia correctly applied the delinquent land statutes of the State with respect to the property formerly owned by the appellant. Such application was clearly consistent with procedural due process concepts as pronounced by this Court in prior decisions. Therefore, the decision of the West Virginia Supreme Court of Appeals should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF SERVICE OF BRIEF OF AMICUS CURIAE

STATE OF WEST VIRGINIA,
COUNTY OF KANAWHA, to-wit:

I, JACK C. McCLUNG, DEPUTY ATTORNEY GENERAL, depose and say that on the 1st day of September, 1976, I served three copies of the foregoing Brief of Amicus Curiae filed on behalf of the State of West Virginia in the Supreme Court of Appeals of the United States, upon Cecle G. Pearson, appellant herein, by depositing the same in a United States post office or mail box with first class postage prepaid, addressed to Philip G. Terrie, counsel of record for said Cecle G. Pearson, at his office at 1009 Security Building, Charleston, West Virginia 25301, and further, that I served three copies of the foregoing Brief upon W. P. Dodd and Ernestine Dodd, his wife, appellees herein, by depositing the same in a United States post office or mail box with first class postage prepaid, addressed to William E. Hamb, counsel of record for said W. P. Dodd and Ernestine Dodd, his wife, at his office at 950 Kanawha Boulevard, East, Charleston, West Virginia 25301, and further, that I served three copies of the foregoing Brief upon Columbia Gas Transmission Corporation, appellee herein, by depositing the same in a United States post office or mail box with first class postage prepaid, addressed to William Roy Rice, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325, and also that I served three copies of the foregoing Brief upon Columbia Gas Transmission Corporation, appellee herein, by depositing the same in

a United States post office or mail box with first class postage prepaid, addressed to Thomas E. Morgan, counsel of record for said Columbia Gas Transmission Corporation, at his office at P. O. Box 1273, Charleston, West Virginia 25325.

/s/ Jack C. McClung
Jack C. McClung

Subscribed and sworn to before me by Jack C. McClung, at Charleston, West Virginia, this 1st day of September, 1976.

My commission expires February 11, 1981.

/s/Toni Ann Maxwell
Notary Public in and for
Kanawha County, West Virginia